

DEMOCRATIZING the JUDICIARY

By John E. Wolfgram *

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DEMOCRATIZING the JUDICIARY

By John E. Wolfgram ¹

PROLOGUE

“Democratizing the Judiciary” begins by demonstrating the magnitude of actual judicial power that outstrips the power of Congress and the “Imperial Presidency” combined, with none of their democratic safeguards. We live under an increasingly dictatorial rule of judicial tyranny. The source of that tyranny is “Judicial Supremacy”, where the Judiciary is the final interpreter of the Constitution. That makes it supreme to the Constitution itself. The Judiciary is a branch of government. Thus, government is supreme to the Constitution. When you think about it, that means “No Constitution at all”. That is our Constitution in Crisis. By “Democratizing the Judiciary” we mean to subjugate it to the democratic processes designed into the Constitution.

After examining the magnitude of the crisis, we focus on the most important issue of our time: “How shall the Constitution and laws be interpreted and applied to actual cases?” Someone must interpret and apply the law. If not the judiciary, then who? And how is justice to be distributed to the People under that system? In search of a solution, we penetrate deeply into the two sources of the judicial problem: Judicial Supremacy and judicial unaccountability.

To gain insight into the problem and range of possible solutions, we compare our principles of Democratizing to those of two other judicial philosophies. The first monopolizes judicial thought today and is based in judicial supremacy. It is represented by conservative Judge Robert Bork’s theory of “Original Understanding”.² The other is based in legislative supremacy as conceived by liberal Professor Mark Tushnet of Georgetown University.³

These three theorists represent the major sectors of legal philosophic debate today.

¹ Authored a related article: *How the Judiciary Stole the Right to Petition*, 31 UWLA Law Rev. (Sum. 2000) 257.

² *The Tempting of America; the Political Seduction of the Law*. (Simon & Schuster, 1989)

³ Tushnet’s breakaway book is “*Taking the Constitution Away from the Judiciary*”. (Princeton Press, 1999)

THE IMPORTANCE OF PHILOSOPHIC DEBATE OVER ALTERNATIVES TO JUDICIAL SUPREMACY

There are three major reasons that this debate over what shall be the developmental path of the judicial philosophy of the United States is important. Let's understand what is at stake.

First is the obvious: The political freedom of the individual. Under judicial supremacy the meaning of the Constitution, the rights and the limitations on government power that it enshrines are dictated by the government's judicial branch. Judicial supremacy means government supremacy over the Constitution, and that translates into supremacy over the people.

Second is the political life of the Nation. The Constitution is written in broad, often sweeping language. What it means in any given situation and how is it to be applied as between government and governed are important questions that should stimulate lively debate. The Constitution is the core of the law. A gray area where its meaning is not clear and reasonable people can disagree, surrounds it. That gray area is where political debate, innovation and experimentation occur. It is the richness of the political life of the nation.

That gray area is also where the Judiciary makes its constitutional decisions, which under judicial supremacy have the force of law. Each time the Court decides an issue it turns the stuff of political debate into matters of law. That takes it out of the debate over what the law is or should be, and by that amount, it impoverishes the political life of the nation.

That is not the end of the story for the Nation. Each turning of gray into black creates more grays and shifts it further and further in one direction away from the original source. That direction has a commonality for succeeding generations of political debate. The issue becomes less and less what the Constitution says or means, and it becomes more and more, what does the government through its judiciary say that the Constitution says or means.

By one judicial decision at a time over 200 years, the government gains control over the politics of the Nation until our Constitution means what it says that it means. Each year there is less and less choice but that we are to be governed in all ways. The only choice is what group shall govern us in all ways. That is the politics of inevitable tyranny choosing a tyrant.

Third: If choosing judicial philosophies that determine the political life of the Nation isn't enough, there are higher stakes: What the "New World Order" shall be, perhaps forever.

The United States, is the "Leader of the Free World" and our political freedom is the standard to which the world compares and develops its own freedom vs. tyranny concepts.

When they compare to us they are comparing to the product of judicial supremacy. As to most of the world, the thing that stands out most is our accumulation of wealth. What they don't see is that we are vastly controlled by a technologically advanced kind of police state.

They see an ethnically "diverse society". But uniting our diversity is a materialistic society with a consumer driven economy in which everyone competes for the same thing, wealth.

That "wealth" is not only beyond their reach, but because the competition for it motivates and organizes our society, it is an axis for government control over us, and over them.

To those looking in we appear to have freedom because we all strive for what the "free" market produces. But underneath are controls that can and do track us by the numbers. We do not dare to deviate from our government's prescription for what is "good for use".

What we don't see is that the controls are in place for massive abuses of power. Because of government immunities that judicial supremacy created, we have no defense to any injustice government and those of wealth and power who control it, would heap on us.

Understand what is going on. The Constitution, on paper, limits government and protects rights. While it is designed to protect us from government injustice, it also puts the police,

judicial machinery, and the military into place to protect government. That system is supposed to protect us from abuses by government, but that same system can turn against us.

Judicial Supremacy is not just a theory. It describes the absoluteness of power that makes government so absolutely corrupt that you can not expect justice from it. For good or for bad, we live in a market economy where everything is for sale, save only those things the government prevents from entering the market place. Of all things that a free people do not want to enter that free market place is the administration of justice so that “justice” becomes a commodity available for purchase by the rich or powerful, but not generally available otherwise.

But that is exactly what our judicial system does. By having corrupted the Constitution with immunity: First, you cannot get justice from government, because it is immune. Second you cannot get justice between yourself and the rich, because judges are unaccountable for dispensing injustice, so justice is for sale, and you do not have the purchase price.

This is our system of “justice” superimposed on our free market that we hold up to the world as “justice, made in America”. It lies to the world. It says that this is the result of “domestic justice founded in our Constitution”. But it is not based in our Constitution, but in government supremacy over the Constitution, a.k.a., in “no constitution at all”. That reality effectively channels the huge economic resources necessary to support the technological advances that we depend on, just as if we were in a continuous state of “national emergency”.

That is the totalitarian state where government has the power to direct the economic resources of the Nation, as in Nazi Germany and Soviet Russia. They too had “super power” status and their citizens had all of the “rights and freedoms” allowed to workers who, like ants in an American ant colony, preformed their designated function for the honor of the state.

Today, we have treaties through the United Nations that likewise, look good on paper.

The International Declaration of Human Rights and the International Covenant on Civil and Political Rights both should protect human rights and national sovereignty under domestic constitutions. But they are on paper only, and their major function is to allow the “Leader of the Free World” to badger Cuba, China and other “non democratic” regimes for not signing them.

Our ratification is almost meaningless because ***we can not comply***. Our ratifying letters have reservations. While the Treaties contemplate that members will enforce them “pursuant to their Constitutional processes”⁴ our treaty partners don’t know that our “Constitutional Processes” are based on anti constitutional government immunity that defeats rights protections.

Case in point. Article 2 of the International Covenant declares:

“2. Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, **in accordance with its constitutional processes** and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

Our “Constitutional Process” maintains sovereign and official immunity. So, how is the Treaty to be enforced against our government? Article 3(a) is directly on point. It declares that:

“3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated **shall have an effective remedy**, notwithstanding the violation has been committed **by persons acting in an official capacity.**”

We pander the Treaty but Human Rights in America are no more protected as a legal matter, then in Cuba or China.⁵ Examine part (b) of the same Section 3. Each Party is obligated:

⁴ The Declaration of Human Rights, Article 8, expressly recognizes the international importance of enforcing domestic constitutions against national governments. It declares: “Everyone has the right to **an effective remedy by the competent national tribunals** for acts violating the fundamental rights **granted him by the constitution or law.**” Note the emphasized parts: “effective remedy” for violations of constitutional rights. But in point, judicially created and maintained government and official immunity render judicial remedy meaningless, and it nullifies the “rights” secured by the Constitution. Indeed, it renders domestic justice under the law a mirage.

⁵ In 1998 Amnesty International published a report cynically entitled “*United States of America, Rights for All*”. On the back cover: “This report reveals a persistent and widespread pattern of human rights violations in the USA. .. in this report is part of a worldwide campaign against human rights abuses in the USA, Amnesty International challenges the US authorities at all levels: to bring US laws and practices into line with international standards ...”.

“(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, **and to develop the possibilities of judicial remedy;**”

We are obligated to “develop the possibilities of judicial remedy” to provide “effective remedies” notwithstanding the violation is “by persons acting in an official capacity”. How do you do that when the government and most of its officers have “official immunity”?

The Covenant was adopted in 1966. President Carter recommended it in 1977 and in 1992 it was ratified by the Senate and signed into Law by President George Bush I. In all of that time our Supreme Court not only failed to develop possibilities of judicial remedy, but it refuses to hear any challenges to immunity based on the Petition Clause or the Treaty.

That has a particular significance. The United Nations has treaties requiring members to effectively protect the rights of their citizens. It is important to all constitutional democracies that “moral forms of law” regulate the United Nations, but moral laws are unenforceable because “The Super Power” has a judicial system inconsistent with its own human rights obligations.

That is where we are today. We, who are concerned with unalienable rights into the future, must expose the contradiction inherent in judicial supremacy ***because that contradiction is about to conquer the World.*** We need to examine honorable alternatives so that we can participate in such treaties in good faith to our own people. Our failure to do that while there is still time for debate will inevitably subject the world to paper “Constitutional Democracies” that are underneath, institutionalized despotism waiting to unleash worldwide tyranny.

World tyranny can be accomplished through the UN, if, but only if, its constituent members accept the contradiction to effective human rights protection. If that happens, elitist judicial tyranny will become the only form of government on earth. Those are the stakes.

PART I

THE CONSTITUTIONAL CRISIS

Judicial Supremacy Has Rewritten Our Constitution

The object of this part is to describe the depth and breadth of The Constitutional Crisis, but not necessarily to detail how it occurred. That was done in “How the Judiciary Stole the Right of Petition”, 31 UWLA (summer 2000) Law Review, 257. That article can be obtained from Constitution.org under “abuses and usurpations”; “confirmed abuses”, then bring me up.

A defender of the existing judicial order might observe that the Supreme Court interprets the Constitution a little at a time, and almost as often preserve rights and limit government, as expand government or limit freedom. He would conclude that over time the judiciary strives for balance between liberal and conservative interpretations of the Constitution. So, if all the judiciary does is balance personal freedom against the needs of governing, how can there be such a crisis that the judiciary is said to have “*stolen* the Constitution”?

The constitutional balance between government and governed does not turn on the number of holdings for or against liberty. A few sweeping anti-constitutional lines of cases undermined the Constitution’s democratic protections doing major damage. Then it remedies a little of the damage over many cases to create an illusion of “balancing”.⁶

A prominent example of creating its own importance is the “Exclusionary Rule”. Since first conceived⁷ in 1886 and applied to the states in 1949,⁸ the Court has addressed it repeatedly.

⁶ There are four basic democratic processes written into the Constitution. They are: 1. The Right to Petition Government for Redress. (That includes the right to sue government civilly, and on the Writ of Habeas Corpus) 2. The Right to Trial by a Jury informed of its right and duty to interpret the law. 3. The Right to Citizen Controlled Grand Juries. 4. The Right to Vote. The first three have been so controlled and undermined by the judiciary as to be practically nullified. The Right to Vote while having been strengthened as a right is undermined by the loss of all democratic control over elected official accountability inherent in effective Petition, Jury and Grand Jury rights. The result is that we “have the right to choose by vote, which of unaccountable little dictators shall rule us.”

⁷ The Court created the Exclusionary Rule out of Fourth and Fifth Amendment concerns in *Boyd v United States*, 116 US 616 (1886). The issue was compelling incriminating papers which the Court likened to seizing self-incrimination. It rejected a purely Fourth Amendment Rule until *Weeks v United States*, 232 US 383 (1914).

⁸ It wasn’t until *Wolf v Colorado*, 338 US 25 (1949) that the Exclusionary Rule was applied to the States. Then throughout the 1950s, the States had different standards. See *Rochin v California*, 342 US 165 (1952); *Irvine v California*, 347 US 128 (1954); *Breithaupt v Abram*, 352 US 432 (1957), a due process case, was reaffirmed in *Schmerber v California*, 384 US 557 (1966) on the Fourth Amendment basis. The exclusionary rule was made

It is a wholly Court created doctrine to “protect rights”. While its cases clarify little, the doctrine busies state and federal courts to amass a fortune in judicial supremacy grandeur. So, for example, in Mapp v Ohio, the Court “noticed” that the Rule should uniformly apply to the states. But it didn’t have supervisory power over the states, so it simply transmuted the supervisory rule into a constitutional rule, saying:

“This Court has ever since *Weeks*, required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and *constitutionally required* – even if judicially implied – deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a ‘form of words’”.⁹

A judicial supremacist will reason that it is necessary for judges to create law to protect Rights and to keep over zealous law enforcement in check. But Judicial Supremacy doesn’t “fix the Constitution”. It breaks it, and then it pretends to fix what it broke and that garners more power for itself, and for the rest of big government.¹⁰

The Judiciary Undermined the Constitution’s Self-Enforcing Ability: First, the judiciary broke the Constitution by creating sovereign, official, state and other immunities. That in turn created the complex, compound and convoluted “law” that keeps the judiciary looking

applicable to the states under federal standards in *Mapp v Ohio*, 367 US 643 (1961). Exactly where the Supreme Court got the authority to supervise state courts on extra-constitutional doctrine, is anybody’s guess.

⁹ *Mapp v Ohio*, 367 US 643, 648 (1961). For other examples of transmutation of supervisory rules into constitutional rules and even into an Eleventh Amendment clause, see *McCarthy v United States* 394 US 459 (1969); *Boykin v Alabama*, 395 US 238 (1969); and *Edleman v Jordan* 415 US 651, (1974). The *Edleman* case is the reverse. The court transmuted a rule of abstention into a Eleventh Amendment Rule. Even clear pro-democracy cases like *Brown v Board of Education*, 347 US 483 (1954) merely addressed a problem sustained by judicial supremacy in *Plessy v Ferguson* 163 US 537 (1896) and created in *Scott v Sanford*, 60 US (19 How.) 393 (1857).

¹⁰ The Exclusionary Rule was never totally accepted. A minority of the Court opposed it almost from its inception. Recently, it has been on the decline, and was severely gutted in 1984 by *United States v Leon*, 486 US 897 (1984) with the creation of the “good faith” exception. More recently, in *Arizona v Evans*, 514 US 1 (1995) the Court ruled that the exclusionary rule does not apply where the illegal search is the result of an error by a court’s clerk. No doubt it will soon be “unconstitutionalized”. But we are more interested in what happened in a philosophic sense. What also occurred over the same period is the rise of official unaccountability for constitutional wrongs through expanding immunity doctrines. The Exclusionary Rule is not being replaced because it is no longer needed to protect constitutional rights. It is being replaced because the People have no effective means of suing government for illegal searches and seizures, and other increasingly rampant violations of the Constitution.

important. But that is what contradicts and nullifies the People's Right to hold government accountable under the law for its violations of the law, through compulsory process of the law.¹¹

The point is that without immunity, the Constitution is largely self-enforcing because when government injures people in violation of rights, they can sue for just redress under law.

Having stolen the Right to Petition, the judiciary created quick fixes like the "exclusionary rule" because government is immune from suit for violating rights. Immunity made the Constitution unenforceable, so we free the criminals whose rights are violated.

Worse, as a practical matter, officials are immune from criminal prosecution too. When the Supreme Court ruled that the Fourteenth Amendment did not include the right to indictment of a grand jury,¹² it created an unconstitutional expedient for states to prosecute persons for crime without grand jury protection. That shifted political power from the people to the government and made prosecution for both political and victimless "crime" a practical reality.

But it had another result. It undermined the grand jury in its most important function: To weed out corruption in government. That function now falls on politicians who trade in favors instead of prosecuting government corruption. Imagine, for example, a district attorney prosecuting judges who control his power, for crimes against the people. So, for example, California has an unenforceable law directed at judicial corruption. Penal Code Sec. 96.5:

Obstruction of Justice: (a) Every judicial officer, court commissioner or referee who commits any act that he or she knows, or should have known, perverts justice or the due administration of the laws, is guilty of a public offense punishable by imprisonment in the county jail for not more than one year.

(b) Nothing in this section prohibits prosecution under paragraph (5) of subdivision (a) of Section 182 of the Penal Code or any other law."¹³

¹¹ See "How the Judiciary Stole the Right to Petition", 31 UWLA Law Rev. 257.

¹² Hurtado v California, 110 US 516 (1884)

¹³ Penal Code Sec. 182(5) is conspiracy to obstruct justice. Conspiracy can raise the offense to a felony.

That's a good law, but it is unenforceable. District attorneys who not only relish the favor of judges, but also participate with the judge in perversions and obstructions of the law, are not likely to prosecute a judge for violating the rights of an accused.

Judicial Supremacy over the Grand Jury: Judges control the selection of grand jurors. In the Capitol of California, the judges are very careful to make sure that the Grand Jury does not "run away" as it did in the mid 1980s when it investigated a "Monica" type affair on the bench. That so embarrassed the judges that they hand picked a "retiring judge"¹⁴ to be the next grand jury foreman so it couldn't run away again. That "tradition" continues. This year 2001, the foreperson is a former Sacramento mayor. Is she appointed to uncover all of the government corruption she knows of, or to prevent it from embarrassing the powers that be?

Judicial control over the grand jury is more absolute than just hand picking the foreman. If it's not enough that government has a stranglehold on criminal prosecution and on the petty jury through judicial supremacy and its tentacles, but it even controls the grand jury, by oath¹⁵

Thus, the Supreme Court's "liberal vs. conservative" contest is only over a little more or less of what the Judiciary has stolen from the Constitution's meaning. In point, our Constitution no longer has the substance necessary to deliver justice between government and governed under the law it proclaims on its face. That is the state of affairs. Our Constitution is no longer designed to limit government, protect rights and redress their violation. Instead, it is a judicially gutted paper tiger that deceives us into believing that we have rights so that we can't see what went wrong as we slip deeper and deeper into a structure for tyranny.

¹⁴ After a little vacation, the judge is now sitting on the Sacramento Superior Court Bench, again.

¹⁵ Penal Code Sec. 911 is the Grand Juror's Oath. After swearing to support the Constitutions, investigate all crimes within the county and maintain secrecy, the oath ends with: "I will keep the charge that will be given to me by the court." That "charge" is Sec. 914(a). "When the grand jury is impaneled and sworn, it shall be charged by the court. In doing so, the court shall give the grand jurors such information as it deems proper, or as is required by law, as to their duties...". Citizen control of the grand jury has given way to systems for government cover-up.

The Sovereign Immunity vs. Right to Petition Issue: Both Federal and state governments have “sovereign immunity” from accountability to the People they injure under color of law. When government consents to suit, its “consent” is muted with complex, compound and convoluted judicial rules calculated to frustrate and deny just redress. “Rights” become “privileges” subject to the “sovereign’s” whim.

So, does immunity abridge rights to petition government to redress of grievances, or not?

The First Amendment declares: “Congress shall make no law ... abridging the right of the People ... to petition the Government for a redress of Grievances.” That is the Heart and Soul of our Constitution. But that “Right” is annulled by a doctrine that declares that people may not sue government or its officers without its consent. Think about it. A “Right” that “Congress shall make no law abridging” yet that “Right” may only be exercised with Congress’ consent?

Even the staunchest judicial supremacist should have a problem with that logic. The problem, judicial supremacy and sovereign immunity have defied all reason for 200 years.

The Right to Sue Government: An astute judicial supremacist would observe that the Right to Petition does not necessarily include the Right to Sue Government. After all, there are many ways to petition for redress. Why focus only on the “right” to sue government?

Again, there is a short form answer. Without the right to sue government, the rest of the “Right to Petition” is reduced to a beggar’s “right” to handouts or favors to those who have something to trade for government’s favor; namely, a new nobility of wealth and favor.

The Right to Sue is the Right to drag government, kicking and screaming, before the Courts of Law, and through “*The Compulsory Process of the Law*”, force it to obey the Law and redress its violations of the law. On what the Right to Sue is, the Supreme Court agrees:

“The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government.”¹⁶

Understand what an *effective* Right to Petition means. Government *compels itself to obey the law* at the behest of interested citizens. The citizen literally has the full power of government to compel it to obey the law as understood and interpreted by other citizens. *That right of juries and grand juries to interpret the law is the cornerstone of Constitutional Democracy.*

That is the “alternative to force”. Without it, all other “rights” are impotent, save one. If government refuses to submit to the rule of law, a free people have no choice but to compel its submission by organizing into militia force to bring government back under the Constitution. That IS the common law upon which the Petition Clause is written, dating all the ways back to the Magna Carta almost eight hundred years ago.¹⁷

The Judicial Problem in a Nutshell: Government immunity and the Right of Petition are direct contradictions that cannot exist under the same Constitution. That is an immutable law of reason. The Right of Petition is written into the Constitution. Government immunity is not. Can there be any doubt as to which is the supreme law, and which is not law at all? That is the judicial problem in a nutshell. But, where does Sovereign Immunity come from?

The short form answer is “From our judiciary.” The judiciary nullified the Right of Petition with government immunity and that doctrine defeats the People’s right to justice.

¹⁶ *Chambers v Baltimore & Ohio R.R.*, 207 US 142, 148 (1907)

¹⁷ See *How the Judiciary Stole the Right to Petition*, 31 UWLA Law Rev. 257, 278 et seq. The meaning of our Right of Petition includes its common law origin and development. As a common law concept, the Right of Petition originates in the Magna Carta of 1215, Chapter 61. As originally conceived and won at Runningmead, the Right to Petition includes, when abridged, the right to take up arms and assemble with the community to wage whatever war against government necessary to get just redress, save only that you not molest the person of the king or his family, and that you resubmit to his authority after just redress has been obtained. It is arguably this very meaning of the right, (to rebel, not molest and then resubmit to the King) that accounts for the survival of English Nobility. But, in our common law, the Right of Petition includes the right of Second Amendment recourse to armed force against the government to force it to obey the law when it refuses to voluntarily submit to the compulsory process of law. That is the Democratic Power of the Right of Petition upon which the essential meaning of our Constitution depends.

The more astute judicial supremacist will quickly contest that: “Sovereign immunity comes not from our judiciary, but from the Common Law of England that we inherited.”

Oh? Let’s see if we understand the judicial supremacist’s argument.

Our forefathers fought the Revolution of 1776 over the right of self-government and they, not England, won. So when they drafted a Constitution of moral justice between government and governed, it was reasonable to think they had that right. But unknown to them, it was all for naught because our national destiny was not available. It was determined by the “Common Law of England” which, winning the Revolution notwithstanding, we were powerless to reject.

A very interesting form of “law” that England has. We fight and win a war to be free of its control, and we “inherit” all of its barbarian institutions, forever? That sort of takes the fun out of “winning” revolutions. But in fact winning the Revolution set us free before God and world to chose our own form of government and to write it into our Supreme Law. That is our Constitution, as it is written. Let us examine the myths the judiciary designed to enslave us.

First, it is **not true** that sovereign immunity was the common law of England.¹⁸ English common law is Hallmarked with rebellions against sovereign power and the rights and limits to that power that were won in those rebellions are England’s Constitution and our common law.

Article 61 of the Magna Carta is the ancestor of our Petition Clause and it proves the point. From 1215, under England’s Magna Carta, it is sovereign immunity to injure the people that is unlawful, and armed rebellion against the Crown for abridging just redress, is lawful.

¹⁸ In *United States v Lee*, 106 US 196 (1882), Justice Miller for the Court discusses the English Right of Petition and finds that after it was established, “it was practiced and observed in the administration of justice in England (and) has been as effective in securing the rights of suitors against the Crown, in all cases appropriate to judicial proceedings as that which the law affords in legal controversies between subjects of the King among themselves.” Then Justice Miller goes on to deny that the “common law” applies to the United States saying: “There is in this Country, however, no such thing as the Petition of Right, as there is no such thing as a kingly head to the Nation, nor of any of the states which compose it.” He ignores completely the First Amendment embodiment of that Right, and the fact that, if it was so established in England, under the rule otherwise so convenient to the Court, we should have “inherited” it. But, in fact, the Right of Petition was established in Chapter 61 of the Magna Carta, in 1215 A.D. England has not had a true “Sovereign Head of the Nation” since then, and that IS our Common Law.

Second, even if it was true, it is generally recognized that we fought and won a Revolution against England on exactly that score.¹⁹ We are not bound by English Common Law.

Third, even if we would “inherit” England’s Common Law on that subject; and even if that Common Law were as supposed by judicial supremacists, winning independence gave us the legal and moral right to write something contrary into our own law, and we did that.²⁰

Fourth, where did the rule that we “inherit the Common Law of England” come from? Why, from the same judiciary that conveniently found what it needed to usurp extensive power not allowed under the Constitution. The purpose of the rule is to flout the Constitution, *because English Common Law cannot, in law or logic, tell us what our law is under our Constitution.* Adopting English Law to regulate the relationship between government and governed assumes that our Constitution does not do that: *But by its very terms, that is exactly what it does.*

The Constitution, by both its general design and its terms, limits government to powers delegated. Immunity from accountability to these it injures in violation of the law *is a power not delegated.*²¹ The Tenth Amendment forbids it. Our Constitution is a closed legal and logical system that declares itself and the laws made pursuant to it, to be the supreme law of the land, and that is the only law that it allows. There is no room in it to “inherit sovereign immunity” from England, or from any place else, even if we had no Petition Clause.

¹⁹ The Revolution of 1776. In Bridges v California, (1941) 314 US 252, 263-264, The Supreme Court noticed of English common law: “For, the argument runs, the power of judges to punish by contempt out of court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. (cites omitted) In any event, it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that “one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.” (cite omitted)

²⁰ Our concept of “Constitutional Government” and “Unalienable Rights” is completely different from the pre-existing British Concept. We have a written Constitution and a written Bill of Rights and our Constitution specifies the powers of government. See Article One (vesting legislative powers in Congress, not English Common Law) and see The First Amendment to our Constitution, Petition Clause and the Tenth Amendment. But the British ideas of limits on government while the basis of our own, are not in a written constitution. Rather, Britain’s “constitution” and rights comes from an assemblage of documents and age-old practices won in rebellion against the Crown.

²¹ Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

But, we do have a Petition Clause. Thus, in addition to the four evidences above that the judiciary corruptly created and maintains sovereign immunity, the entire state and federal judiciary has systematically refused to address the *Immunity vs. Petition Clause* issue²² that is at the heart of the government to governed relationship, for over 200 years.²³

A Constitutional problem of that scope can not plausibly happen in a system designed to be self-correcting, by accident. It is easier to believe in tooth ferries than to believe that for 200 years the issue just simply was never brought to judicial attention; thousands of times.

That Right to Justice between Government and Governed is The Cornerstone of our Civilization.²⁴ It is a substantive right, not merely procedural. The only way to get just redress is by objective standards of law common to everyone. If government can make special “privileges and immunities” for itself, it will do as it has: Re-design the law to defeat justice.

The Appearance of Judicial Corruption: Part of our Constitutional Crisis is what appears on the face of the “*Immunity vs. Petition Clause*” issue. It is institutionalized corruption at the heart of the Constitution and it is long overdue that it be declared openly: Immunity is “Immunity to Justice”, and if that is law, then necessarily “Injustice is law of the land”.

This is corruption of such obvious proportion that *No judge can compare sovereign immunity to the Petition Clause and not know which is LAW and which is Corruption of the Law.* What judge will say, after 200 years of judicial supremacy, “Whoops, we just didn’t notice the plain meaning of the Petition Clause. The whole doctrine of Sovereign Immunity, is void.”

²² The first published opinion raising the issue of the effect of the Petition Clause on the People’s Right to sue their own government is *Wolfram v Wells Fargo*, 53 Cal. App. 4th 43 (1997). While I lost that case, I compelled its publication so that eventually the legal community would become aware that there was such an issue. Its holding is so weak that when tested, it will be rejected, and the issue will emerge in its own right.

²³ There are a few cases that address the First Amendment point of the Petition Clause, but none that do it in the context of immunity. The proof of that is in the putting: Try to find one.

²⁴ I can’t account for the consistent failure of Supreme Court to address the obvious issue of what the Petition Clause does to both state and federal sovereign immunity concepts. One way to resolve the question of whether the Court intentionally buried that issue is to audit all petitions to it over the last fifty years to determine how many times the issue was presented but not addressed and compare that to the many lessor issues that were addressed.

No judge or justice wants to be first to discover such an error, so the entire judiciary shuts its eyes and refuses to address the issue notwithstanding that it has been a repeated issue of “First Impression” for 200 years. That is called “a judicial cover-up of the theft of our Constitution”.

The scope of the usurpation: Sovereign immunity changes the basic relationship between government and its people from one seeking moral justice under the law to one in which people have no enforceable rights and government has no enforceable limits. That concept of moral justice; of striving to *establish Justice and domestic Tranquility* is what distinguishes barbarian from civilized society. The Founders designed the Constitution to transform the barbarian rule we rejected as Colonies, into a civilization befitting the dignity of a free people. What more proof that moral Justice between government and governed is to be interpreted into our Constitution is needed, than that it be written into the Preamble to the Constitution?

It is a Primary Right to Effective avenues of just redress for violation of constitutional rights. That is what it means to be civilized.²⁵ But notice a peculiarity. “Justice” is not a legal, but a moral concept, and it is not stated in our Constitution, but in its Preamble, as its purpose.

Since a Moral Purpose of our Constitution is to “establish Justice”, guidance from moral principles like justice, equality, human dignity and liberty, as constituents of “Justice”, is necessary to interpret it. Judge Bork argues against using moral concepts in interpreting it, and he declares that any theory of interpretation based in moral law is impossible.

Judge Bork and Judicial Supremacy. President Ronald Reagan nominated JUDGE ROBERT BORK to the United States Supreme Court in 1987, saying:

²⁵ The Right to *effective* redress of grievances arising under domestic constitutions is specified in Article 8 of the Universal Declaration of Human Rights. A similar right is declared in Article 2, Section 3 of the International Covenant on Civil and Political Rights, concerning rights arising under that treaty. Interestingly, that section specifically requires that persons whose rights are violated “shall have an effective remedy, notwithstanding the violation has been committed by persons acting in an official capacity.” That effectively bars sovereign immunity.

"Judge Bork is recognized as a premier constitutional authority. His outstanding intellect and unrivaled scholarly credentials are reflected in his thoughtful examination of the broad fundamental legal issues of our times. ...

"Judge Bork, widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, shares my view that judge's personal preferences and values should not be part of their constitutional interpretations. The guiding principle of judicial restraint recognizes that under the Constitution it is the exclusive province of the legislature to enact laws and the role of the courts to interpret them." (President Reagan's Nomination Statement, July 1, 1987.)

Almost immediately Senator Ted Kennedy presented another view on national television.

"Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy."²⁶

The liberal wing of the Senate Judiciary Committee launched the strongest opposition any Supreme Court nominee ever faced. Judge Bork lost confirmation, resigned from the U. S. Court of Appeals and wrote a book defending his philosophy of "Original Understanding".²⁷

There is an initial problem in comparing Judge Bork's "Original Understanding" to alternative legal theories, for Judge Bork says that no other legal theory is possible, and then he goes on to argue that Moral Law has no role in constitutional interpretation.

The Impossibility of Alternative Theories: ²⁸ It **almost seems self-evident** that the only legitimate way to interpret the Constitution is to find the Framers intention and let that be your guide. But an opposite theory also seems self-evident. The Constitution was written for We, the People, not for sleuths to delve into crypts for signs of the subjective understandings of Framers long dead. The best way to interpret a constitution is "as it is written" and the best evidence of what the Framers "understood" in writing it, is what it says to ordinary living people.

²⁶ Both quotations are taken from Judge Bork's *The Tempting of America*, Part III, "The Bloody Crossroads".

²⁷ *The Tempting of America; The Political Seduction of the Law*, Touchstone (Simon and Schuster)

²⁸ Ibid. Chapter 12 is titled: "The Impossibility of All Theories that Depart from Original Understanding."

Bork's theories are based in the former. Tushnet's "Legislative Supremacy" and my "Judicial Democracy" are founded on the latter.²⁹ He assumes there is an original understanding to be found. But, at best "original understanding" is a composite of majorities who expressed their best political understanding in the document that they signed.³⁰ To seek understandings beyond that can only end with the same political question that it began: Which of the Framers' many, often opposing understandings, should prevail today on any particular issue?

"Original Understanding" is like a *Rorschach*: Each jurist finds in it what he brings. Bork and conventional theorists bring "judicial supremacy". That an "original understanding" can be found presumes there is someone, the judges, to find and declare it. Those assumptions underlie their judicial concepts and pervert every interpretation of law that they make.

According to the orthodox religion of judicial supremacy, only the experts (Judges) can interpret the Constitution authoritatively because only they can sift through the Framers' crypts to find the "original understandings" they meant but failed to write into the Constitution.³¹

With 200 years of "judicial gloss", amendments and differences of opinion among the Framers, there is no such thing as an "original understanding", but just arguments for which interpretation to apply now. The solution is not to find a "true" understanding that doesn't exist, but to find the democratic balancing forces that read Moral Reason back into the written law.

²⁹ Tushnet finds principles for his thin Constitution in the "Project of the Declaration" and in the Preamble. I find similar principles in the "main line themes" of the Constitution. In a way, we also seek an original understanding. What I object to is asserting premises for a theory called "Original Understanding" that are so grossly inconsistent with any plausible historic understanding the Framers might have had. The theory that "an" original understanding can be found and that judges are uniquely qualified to find and declare it, is absolutely inconsistent with any plausible "understanding" that any, let alone a majority of the Framers had. I go farther than Tushnet to also demonstrate the ridiculous interpretations judicial supremacy has made in the name of "original understanding" that outright contradict the Constitution, as it is written. Immunity and arrogance to the Petition Clause are two of them.

³⁰ The best understanding of the Constitution then, and now is: "Let there be Politics, lots of politics, forever." The Constitution was born in politics and it thrives in politics. It is when politics is made into law that trouble begins.

³¹ Bork would never say that the People *can't* interpret the Constitution. That is too revealing. He would only say that they can't do it authoritatively. Everyone can have an opinion of what the Constitution says and means. But only judge's opinions count. That captures the essential elitism of judicial supremacy.

Who Should Interpret the Constitution? Bork simply assumes that judges should be the Constitution's final arbitrators. How convenient that the Law designed to restrain government is to be interpreted by its very own judges. Why shouldn't the people have that power? ³²

The People, sitting as juries decide one case at a time providing the necessary feedback telling the legislature if its "laws" meet the people's common sense morality. Judge Bork would say that is anarchy and would destroy our institutions. But that is paranoia talking. Far from anarchy, it gives government the opportunity to develop better and more moral law, and to simplify a legal system overburdened with two centuries of antiquated rationalizations.

Judge Bork Argues against Moral Theory: Judge Bork describes his objection to judges making constitutional decisions on the basis of moral law, at Page 252.

"...at a minimum, the judges must have a moral theory and persuade the public to accept it without simultaneously destroying the function of Judicial Supremacy."

Bork begs both important questions. The first is whether a judicial philosophy can be imposed without "persuading the public to accept it". Judicial supremacy is a judicial doctrine that was assumed without prior description or consent. It creates principles of interpretation like "Substantive Due Process", "Compelling or Rational State Interest" and the "Exclusionary Rule", all premised on a self-legitimizing unstated moral equivalent of "Divine Right". But the judiciary covers up its judicial supremacy operations with a nice sounding but hollow doctrine called "Original Understanding" that allows judges to interpret law according to their subjective whims by invoking the name of Framers who can no longer defend their own honor.

The second issue begged is that the "Function of Judicial Supremacy" should be sustained. It is interesting that this major premise that makes such a tremendous difference in the judicial role, is just assumed as if no alternative is possible.

³² This raises a government argument. "What is 'interpretation' if every one can have a different one? The Judiciary speaks with one voice on its interpretation. The people have no single interpretation and no one to speak for them." As we shall see, this is a false argument. Tushnet has the elected representatives interpreting and speaking for the People. For Wolfram, the jury interprets and speaks with one voice on each case.

Should Judicial Supremacy be Sustained? The answer is self-evident. Because judicial supremacy is supremacy over the Constitution, and because the judiciary is a part of government, ultimately, judicial supremacy means that government is supreme to the Constitution, *and that means “No Constitution at All”*. If we “should have a constitution” then it follows as night follows day, that “we should not maintain judicial supremacy” for it annuls our Constitution.

Bork would say that the Supreme Court does not interpret the Constitution so broadly as to be called “Amendments.” But in fact, the most far-reaching changes in the relationship between government and governed have been accomplished by judicial fiat. To identify a few:

Sovereign, absolute judicial, prosecutorial, official and qualified immunity. First Amendment compelling state interest and judicial indifference to the Right of Petition. Eleventh Amendment state immunity from its own citizens, exclusion of arms ownership from the Second Amendment, Fourth Amendment exclusionary rule, Fifth Amendment rational state interest, property seizure without process; watering down the people’s protections like jury and grand jury rights, linking "cruel and unusual" to our barbaric past, and so on.

The weakness of Bork’s argument suggests a design to pre-empt a question: “Why should government, through any branch, be supreme to the Constitution in governing its people?”

The Answer: There is no reason. Judge Bork's "Original Understanding" is not mine or yours, but government propaganda of its own contentions designed to mislead us. His theory is in reality, divorced from the most important rules for interpreting any legal document, to wit:

First: The best evidence of what a document means is what it says, as it is written.

Second: What parties to writings intend is a question of fact for the jury. That it should be different in finding an "Original Understanding" is an arbitrary rule for arbitrary government.

Third: There are two parties bound by the Constitution, government and governed. Every theory examined by Judge Bork, whether his or his straw man opponents, the "law professors", relies on one fundamentally false premise: That it is somehow "legitimate" for one party to a two party “understanding” to unilaterally declare itself the final interpreter of that understanding.

“Original Understanding” is not a theory of "interpretation". It is propaganda to justify judicial tyranny disguised as an “inevitable favor” that judges do for us because "We, the People, are not capable of interpreting our Constitution for ourselves."

Bork opposes morality in interpreting law because there is no room for morality in judicial supremacy and judicial supremacy depends on the myth of “Original Understanding” to rationalize itself into continued existence. But all one need for reason is to ask two simple questions: Without recourse to moral principle, what is “Justice”? If a purpose of the Constitution is to “establish Justice” as its Preamble declares, how can that be done without bringing the moral principles of justice into its interpretation and application? I would rest my case here, except that Judge Bork goes on to argue that a theory of Moral Law is impossible.

Judge Bork’s “Impossibility of Moral Law”. Judge Bork has four more arguments to convince us that that the Constitution has no place for moral law.³³ Bork’s First Argument:

Except through an original understanding there is no satisfactory explanation of why judges have authority to impose their morality upon the rest of society. The way (the professors) impose their morality is "for judges slowly to increase the number of occasions on which they invalidate legislative decisions, always claiming that this is what the Constitution requires, until they effectively run the nation or such aspects of policy as the professors care about."

This is exactly what judges do in the name of “Original Understanding”, but why should we believe that a "satisfactory explanation" is necessary at all? In fact, tyrannies emerge and thrive based in such irrational explanations as "The Divine Right of Kings". The ultimate justification for unrestrained power historically, is superstition and force, not a good reason.³⁴

Judge Bork’s justification ultimately means, "Trust the judges on faith." While he would deny that, he has to explain his own methods. Take for example, his treatment of the Fourteenth

³³ Ibid. His three arguments begin on page 252.

³⁴ In *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), Justice Holmes said that the reason for sovereign immunity is because "there can be no legal right as against the authority that makes the law on which the right depends." That is superstition based in threat of force. The only way he can be right is by conceding the premise that “law” is what ever that authority says that it is. That assumes the arbitrary law making power that begs all of the interesting questions that cause revolutions. The civilized alternative is that government is subject to a higher “moral authority” the disobedience to which defeats its lawful authority. And history does seem to bear that out.

Amendment Privileges and Immunities Clause.³⁵ It is too expansive of judicial power, in Judge Bork's view, so he says of the "original understanding" of "[T]hat clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter."³⁶

If his treatment of the Privileges and Immunities Clause is subjective, the only way to describe his treatment of the Petition Clause is that it does not exist. If one were to ask him why he ignores these "expansive" clauses, his answer is 'Because they are so expansive of judicial power without a clear legislative history demonstrating that the Framers intended that'.

Bork's response is misleading. While it is true that courts seldom interpret the Privileges and Immunities Clause directly, it is not because the Framers' intent is not clear, but because the same Framers also wrote that clause into statutes that are interpreted by judicial fiat.³⁷

Notice a peculiarity about Bork's "Judicial Conservatism". It applies only to expansive clauses where, when judges bow to Congress ***on those clauses the effect is to abrogate judicial protection of rights***. His brand of "judicial conservatism" unites government against the people by selectively ignoring those clauses that defend Moral Rights against indecent government.

Thus, his first argument not only fails to say why alternative theories should not emerge, but it affirms a design by which government is the final arbiter of the instrument designed to limit it, and it unites the branches of government against the moral liberty of the People. And he calls that "The Original Understanding". No wonder the "liberal wing" became so upset.

Bork's Second Argument begins on page 253.

"In order to gain the assent of the public, the judges explanation of why they are entitled to displace our moral choices with theirs would require the judges to articulate a system of morality upon which all persons of good will and adequate intelligence must agree."

This is utter sophistry. Notice that while Bork argues that "assent of the public" is important before injecting morality into judicial interpretation, he has no room for such "assent"

³⁵ Ibid. at pp 36-39. That clause declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

³⁶ Ibid. P. 166. The "mystery" is judicially created by the judiciary not wanting to "extend" rights to the people.

³⁷ See 42 USC 1983 and 18 USC 241-242. It is one of the most interpreted clauses in the Constitution, albeit, under statutes that use the same words, "Privileges and immunities".

in his theory of interpreting expansions of government power over the people. Rather, by calling it "Original Understanding" we are to believe that the constitutional innovations judges make in favor of greater power are merely the unfinished works of the Framers and our consent to such changes two hundred years after the fact is not necessary.³⁸

Next, observe the standard he asserts. It's easy to prove impossibility by standards like "all reasonable people must agree". Even our Bill of Rights was not that universally accepted. *The standard by which moral principle becomes legal doctrine is not "universality", but the standard the Constitution sets for amendment.* But compare Bork's standard to the Court's five to four decisions. Regardless of what a decision turns on, why should the standard change from a majority of Justices to "all persons of good will and adequate intelligence" just because the deciding principle changes from pragmatism to principle based in moral law?

Bork's Third Argument is on page 253:

It is phrased an "objection to all theories that require judges to make major moral choices". His objection ascribes separate roles to moral and to legal reasoning, and while he concedes that moral philosophy has a role in legal reasoning, its role is limited to "assisting judges in the continuing task of deciding whether a new case is inside or outside an old legal principle."

If Judge Bork merely means, "as opposed to creating new legal principles", we can agree. But he doesn't mean that at all. As he explains the complexity of constitutional reasoning, principles are to be selected at different levels.³⁹ There are enough "old legal principles" already established so that a judge can reach any end he wants without creating new ones or going outside the bounds of accepted legal reasoning of higher court decisions.

³⁸ Judge Bork has a cop-out. Where the Constitution is silent, he says, the legislature is free to act. That ignores the judicial role in creating that "silence". The most deafening silence in America today, is judicial arrogance to the Petition Clause as the judiciary systematically goes about insulating all of government from accountability to the people by creating immunity. It isn't the Constitution that is silent about that invasion of rights, but the judges.

³⁹ Ibid Chapter. 7, The Original Understanding

Bork's system of "Judicial Supremacy" is based in a disciplinary rule of "*stare decisis*" in which the higher court sets rules and principles lower courts must follow. Today, trial courts never and higher courts seldom reason from or to the Constitution. In fact, legal education consists in learning two centuries of "judicial gloss" taught as propaganda through bar association law schools while the Constitution itself, is not taught at all.

While Judge Bork would not have judges "making major moral decisions", the fact is that the first constitutional decision any judge makes embodies the most important moral decision he will ever make. Shall he keep faith with the Constitution as his oath commands or to the rule of *stare decisis* as his more temporal interests require?⁴⁰ In his system judges begin their service with intent to defraud the people of true fidelity to the Constitution. *Stare decisis* creates a false appearance of discipline by which judges justify the moral cowardice of refusing to face tough issues like "*Immunity v Petition Clause*" because the higher courts are moral cowards too.

Bork's Fourth Argument, Judge Bork states a reason for his "conservative" beliefs:

"The first reason to doubt that moral philosophy can ever arrive at a universally accepted system is simply that it never has."⁴¹ He then recites some philosophers who tried and failed, and concludes that it is not possible.

We just saw the fallacy of the first part of that: Just as moral principles are the foundation of the Constitution in the first place, they can amend it and the standard is not "universality" but as set by the Constitution for amendment. But the rest of his proposition is just plain silly. The only way for Judge Bork to come to this conclusion is if he believes there is no objective basis for moral values; that every moral philosophy is like any other and none have any margin of objective truth or goodness by which to accept one and reject another.

I say that because Bork's conclusion denies that through reason and over time we mortals can separate good from evil and moral truth from falsity. That is what the "Science of Ethics" does. His "conservative" premise denying human reason is frightening, and very sad.

⁴⁰ See footnote 53, *infra*, quotation of Judge Liddle in *Wuebker v James*.

⁴¹ *Ibid*, Page 254. If this is what it means to be "conservative", then I have become liberal with knowing it.

Think about it. Only eight hundred years ago western culture was locked in a "Dark Ages" haunted by evil demons and witches were burned at the stake. The "heavens" were made of "celestial stuff" through which the sun circled a flat earth. Kings ruled by Divine Right and the "rule of law" was the might of the sword. In rebellion to that tyranny, the common morality of the land was for the first time translated into written law, and the Magna Carta was born.

It took another four centuries for mortal man put two lens together to peer into the "celestial stuff" just like we are peering into Bork's "Original Understanding", and in the space of one hundred years the entire nature of the universe and man's place in it, changed forever.

Still struggling to grasp the meaning of his new *moral relationship to a universe accessible to reason*, another mortal sitting under an apple tree conceived that all this data is related and could be organized into a body of knowledge. It is called science, and from it came the industrial revolution and advances by leaps and bounds in all of man's endeavors.

Bork thinks these are advances in science, not in moral philosophy and law. Nonsense! Moral philosophy and law *are a science*. It learns from experience and from the ideas of moral thinkers who abstract principles and reorganize them for greater and greater meaning to our real world. That's what a science is. Fortunately, the rest of science isn't shackled by the dogma of "Divine Right" made compulsory propaganda by *stare decisis* through state run law schools.⁴²

As in other sciences, liberation from superstition gives rise to new ideas of human worth. In 1863 on a battlefield to end human slavery, four moral principles achieved immortality:

"Four score and seven years ago our forefathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal..."

That is as profound a recognition of accomplished moral philosophy as any there is and it

refers to the roots of four moral principles "four score and seven years" earlier, in 1776:

"We hold these truths to be self evident; (1) that all men are created equal, (2) that they are endowed by their Creator with certain unalienable rights, (3) that...to

⁴² This wasn't always true. Empirical science was shackled by state enforced dogma until Galileo broke free of it to see and to think the unthinkable. For his "heresy", in 1633, he was persecuted by the moral equivalent of our State Bar Associations, the Inquisition, and imprisoned in his house for the rest of his life. When forced to recant his view that the earth was not the center of the Universe, he was heard to utter under his breath: "But it does move".

secure these rights, governments are instituted among men, (4) deriving their just powers from the consent of the governed..." (Numbers added).

Another new moral idea of man's just relationship to government gave birth in 1789, to his first written constitution. And if that was moral philosophy's finest hour, within two years another shown brightly: The Bill of Rights. So much for Judge Bork's contention that "moral philosophy can't arrive at a universally accepted system". Our Constitution embodies a moral philosophy that is universally accepted by our People. *It is only our government that is in open rebellion against its normative restrictions on the immoral uses and abuses of power.*

Where do you think the moral ideas that founded our Nation came from, if not from moral philosophers who thought the unthinkable? They grasped through reason, the existence of moral law above man's law, and they passed that moral philosophy down to the Founders.

That was the beginning. Our Moral Nation survived in a barbarian world that knew nothing of rights or democracy and couldn't care less about morality. We taught the French and weathered the British and with primitive tools and a morality that had not yet bloomed, we conquered a wilderness, and the cosmos, the "celestial stuff" of the universe is our new frontier.

To be sure, we have our shames: We enslaved the Black and ruthlessly slaughtered the Red, and paid the price of immorality in a civil war made necessary by twisted judicial dogma handed down in *Scott v Sanford*.⁴³ Moral principles, like those of any other science, are not born in full bloom. We had much to learn about moral law and we are still learning how to translate and apply it.⁴⁴ Learning morality is fraught with pain, but we have become more civilized and in the process we are bringing our morality to the world. We can't avoid that. The only question is whether the morality that we practice before the world, is good or bad morality.

A Philosophy of Moral Law is in Place: Moral philosophy, as it relates to law, is more than anything else, theories of the proper relationship among people and between them and their government. In two percent of recorded history we changed from a-moral barbarians in a new land, to birth and nurture five major moral principles that are now sweeping the world.

⁴³ The "Dred Scott" case. *Scott v Sanford*, 60 U.S. (19 How.) 393(1857)

⁴⁴ We are learning a new moral sub-principle of equality. Mere apology for such wrongs, even when combined with legal equality is not sufficient. The process of cultural integration is slow and arduous, but necessary for atonement.

First is the concept of unalienable rights; a la Our Declaration of Independence of 1776.

Second is limited governments founded on constitutions; a la Our Constitution of 1789.

Third are those insidious notions of "Due Process" protecting life, liberty and property that endlessly haunt arbitrary government, judicial supremacy notwithstanding.

Fourth is the democratic foundation and purpose of our institutions that is moving the entire world from entrenched elitism to participatory democracy, one nation after another.

Fifth are the moral ideas of legal equality and inherent dignity of persons that is breaking down the barriers of ignorance and prejudice in all languages, and in all lands.

While this moral philosophy is not exactly "universal", it is clearly the "better mouse trap" for which the entire world is beating a path to our door. These same principles, born in America in 1776, are now treaties among nations to respect the *moral rights of their own people*.

Judge Bork would point to the differences in limitations on government, of rights, of due process and on what matters democracy and equal protection apply. There are differences to be sure, but against that Hallmark of accomplished moral values, the moral philosophy he says is impossible is here, now, and his concerns are trivial in comparison to that overwhelming reality.

We know that judicial supremacy organizes government to prevent moral ideas that limit its power from blooming, with a force that rivals the Inquisition. But the spirit of Galileo lives in the People's common sense of morality. It is too late to stop the process. The Sixth Great Moral Idea to harness the barbarians is knocking at civilization's door. That Idea is to temper the absoluteness of judicial power that so corrupts our government, with people oriented moral justice by ***Democratizing the Judicial power to interpret the Constitution.***

Let's examine next, the Two Judicial Problems that must be Democratized.

PART II

THE TWO JUDICIAL PROBLEMS TO BE “DEMOCRATIZED”

There are two conceptually distinct judicial problems to be democratized. The first is “Judicial Supremacy”. The second is judicial accountability. While the first problem caused the second, they should be examined separately, lest we “throw the baby out with the bath water”.

PART IIA: Judicial Supremacy. Judicial supremacy as it exists today is both Judicial Review over government and government supremacy over the Constitution. But what is judicial review without government supremacy? Can the two be separated? To do that we must understand what “Judicial Supremacy” is and then separate it from government supremacy, to see if we have anything left that looks like “A baby, without the dirty bath water”.

The distinguishing characteristic is “The Power to Interpret the Constitution with the Force of Law”. That is what inevitably turns judicial supremacy into supremacy over the Constitution. Yet, the power to invalidate unconstitutional acts is a necessary power without which the judiciary cannot perform its Article III function.⁴⁵ How do we save the necessary power of judicial review and discard the power of supremacy over the Constitution?

Can Judicial Review exist without supremacy over the Constitution? That is indeed what the Constitution designs. Judicial review does not require supremacy over the Constitution; but only among the branches of government, and nature places it to exercise the one without the other. To save judicial review but discard supremacy over the Constitution, the judiciary needs only the power to resolve cases with rules binding on government, not over the Constitution nor binding on the people. That is judicial review without the force of law.

⁴⁵ The Article III function arises under Article III, Section 2: The judicial Power shall extend to all cases, in Law or Equity, arising under this Constitution ...”. The “Article III Judicial Function” is necessarily, to interpret “this Constitution” in order to resolve cases arising under it. That function is also known as “Judicial Review”.

Rules for Democratizing the Judiciary: The only (practical) way to separate judicial review from supremacy over the Constitution is to “Democratize the Judiciary”. But in “Democratizing” it, we must follow basic rules for developing a science of constitutional law.

The rules are simple: We are not to rewrite or amend the Constitution. Our object is to “Democratize the Judiciary” that exists, not to create a new one. We are not free to create just any “judicial democracy” expedient to our ends. To the Contrary: We must develop our judicial-democratic theories within the confines of the Constitution, as it is written.

In developing a theory of constitutional interpretation, we must obey the law of non-contradiction. The Constitution, as it is written, is the supreme law. Any theory of Interpretation that contradicts it is by that fact, invalidated.

Interpretation of Law is Not Law: The important thing about government supremacy is what it does to the Constitution. It takes legal supremacy from it and concedes it to some officials’ mere interpretation of it, and law becomes what the official says that it is instead of the Constitution itself. “We, the People”⁴⁶ become bound by our agent’s opinion of what we said, instead of by what we “ordain and establish as the Constitution for the United States”.⁴⁷

The underlying evil is the power to interpret law as if the interpreter can dictate law. The power to dictate the law is the power to corrupt the law, and that power then becomes available as an expedient means by which to consolidate powers for despotic ends.

Our Maxim: “As power corrupts, absolute power corrupts absolutely.” But government needs power to do what our Constitution requires of it. What we are looking for are balancing forces of accountability which allows government the power necessary to perform its duties,

⁴⁶ “We, the People” is used in this article to denote “The People” as the real sovereign power that created the Constitution. Thus the final interpretative power over it is vested in the People. That vestment is recorded in the Preamble to the Constitution of the United States of America. Question: Is that meaningful or rhetorical? If the Preamble is to have meaning, it is the right of “People Power” over the government by vote, by jury and grand jury.

⁴⁷ This paraphrase refers to the Preamble to the United States Constitution.

while protecting the people from abuses and usurpations; and we must find them within the Constitution, as it is written, and without contradiction to it.

We know there are designs within the Constitution balancing the powers of each branch against each other. But we are looking for popular forces that balance judicial power to interpret the Constitution, to prevent judicial interpretation of the law from being law.

Democratizing the Judiciary means critically subjecting the judiciary to the democratic balancing forces retained by the People in the Constitution. Thus, if judicial supremacy is to be democratized while allowing judicial review, judicial interpretations of law must be “supreme” among the branches, but they are not laws binding on the people.⁴⁸

“Constitutional balancing forces” are forces of accountability and restraint of government that are built into the Constitution. We are specifically interested in balancing forces that restrain the judiciary from becoming a “sovereign” unto it self. “Democratizing the Judiciary” is subjecting it to democratic restraints designed into the Constitution.

This idea is not nearly as complex as it seems. The Framers built balancing forces into the Constitution.⁴⁹ When they made it the supreme law, they said so outright.⁵⁰ But they didn’t say that judicial interpretations of it are law. While judicial interpretations are important, we must remember that the People ordained the Constitution, *so their interpretations of it are important too.* The question is of the institutionalized balance designed into the Constitution.

This is important because the Framers knew that government could impose contrived interpretations of law upon them. So, We, the People are concerned. Common sense says that if we are to be controlled by the law, then we must be able to interpret and apply it ourselves. If only government can interpret “law”, it will do so according to its own rules and redesign the

⁴⁸ Article I: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Creating principles with the force of law is a legislative power.

⁴⁹ There are four democratic restraints on government built into the Constitution. See Footnote 6, *supra*.

⁵⁰ U.S. Constitution, Article VI, Clause 2.

Constitution for its own convenience. And that is exactly what it did with its creation of sovereign, state and official immunity to annul the People's Right to Justice under the Law.

The point: If the law is intended to apply to the People, then it must be understood according to rules of common sense. If that, then it is peculiarly in the province of the People, sitting as juries and grand juries, to interpret and apply it to cases. That is the People's balancing force against the judiciary becoming a "sovereign" unto itself; and it is the only way to prevent government's interpretation of law from becoming the instrument of oppression.

Lawyers call what judges do, "legal reasoning". But it is not. Reasoning is reasoning, and while some reasoning is better than others there are no distinct "rules of reason" that apply to interpreting Constitutions but not to interpreting the laws of science.⁵¹

By separating "legal reasoning" from common sense, the judiciary frees itself to create its own "rule of reason". The "rule" that we can penetrate the Constitution and Revolution of 1776 to adopt the (false) English Common Law of sovereign, judicial, et ceteras immunity, is one of those "rules" designed to confuse that can not in common sense make law for us. Nor is it a "rule of reason" that antiquated or barbaric practices should prevail just because they are ancient.

Now lets look at it again: The Constitution is the law to be applied to the case by rules of reason. Among the reasons are plausible "original understandings" (Per Bork) and among things helpful to finding that are the Declaration of Independence and Preamble (Per Tushnet). But these are not exclusive means of interpretation. All reason applies and if an interpretation cannot be fairly applied, "Original Understanding" be damned, that interpretation is not to be applied.

Supremacy Among Branches of Government: Judicial supremacy among the branches of government arises out of its logical order in Three Equal Branches. That is, for a proposition

⁵¹ Should we, for example, have one set of rules for interpreting contracts and a different set for interpreting the Constitution? And if we are to have different sets, where do rules like "only one party to the Constitution gets to interpret it with the force of law" come from?

to become a law Congress must pass it. That it did pass it indicates that a majority believe it is Constitutional. Next, the President must enforce it. That he did enforce it demonstrates his belief that it is Constitutional. Finally, the act or its implications come before the Judiciary.

While a judicial determination of unconstitutionality is equal to Congress' power not to pass the act, or to the President's refusal to enforce it, its position in the order of events makes it "supreme" to the other branches that previously "certified" that the act is constitutional.

That is what lawful judicial supremacy is. The other branches may concede further supremacy for several reasons. For example, the judiciary addresses the constitutional concerns of citizens aggrieved by acts and a judicial opinion can guide the other branches and their officers as to why the judiciary will or will not enforce similar acts.⁵²

In effect, a natural "supremacy" arises out of equality, logical order, necessity to apply general principles of constitutional law to specific circumstances, and for government to have a single authoritative spokesman interpreting the Constitution for it. Realizing that, it is natural for government to give deference to judicial opinions to guide it on how to make its acts pass the judicial tests of constitutionality that they must pass to receive judicial recognition as law.

⁵² Government consists of millions of people. They may need a single body to officially interpret the law for them, so that they can perform their function as government employees. Tushnet's ideas notwithstanding, Congress really can't do that and even the most ardent advocate of an imperial presidency wouldn't want the President to do it

Judicial Review: While judicial interpretation of the law is not law, it is sufficient for judicial review.⁵³ As government’s “contention” of what the law is, it is binding on government, not as law, but as a judicial “veto” of the law. But “judicial law” is not binding on the People.

Professor Mark Tushnet’s Theory of Legislative Supremacy⁵⁴

Early in my search for an alternative to judicial supremacy, I examined legislative supremacy and rejected it. Professor Tushnet explores that same alternative but from a different perspective. He is a liberal looking for a liberal theory while I was a frustrated liberated conservative looking for any theory to break the judicial supremacy stranglehold. While his ideas are from a liberal orientation, he deals with important social rights issues that will be with us for a long time and debate over “Constitutional Social Welfare Rights”⁵⁵ with, or without judicial review, can only help us deal with those issues more morally and maturely.

His legal/moral basis for social welfare rights is intriguing. He finds it in the “Ongoing Project of the Declaration of Independence” and in the Preamble. That is similar to my notion that our Declaration and Constitution began a process of man becoming civilized. While I think the rights he seeks only exist under the Ninth Amendment, he points to the kind of justification that could stimulate enquiry by a Congress representing a people becoming more civilized.

Our primary interest in his work here, is how he deals with judicial supremacy to free Congress to do the work of representing the People.

⁵³ Judicial Review has two separate basis of authority. The first is the consent of the rest of government. The Second is the oath to support the Constitution. When a Judge believes that an act violates the Constitution, there is no power on earth to make him support it. The most eloquent statement of this conviction is by Judge Liddle in *Wuebker v James (Bowles)* 58 NYS 2d 671, (1944). This is what he said to the United States Supreme Court:

“Under the Constitutional requirement that all ... judicial officers of the several states shall take an oath to support the Constitution, the Constitution, alone, as it is written, is the sole test, and the support of an act of Congress or any law promulgated by any other federal officer or court decision, is not required. Only the Constitution and laws made in pursuance (not in violation thereof) are declared to be the supreme law of the land. Decisions of the United States Supreme Court are not included as any part of the supreme law of the land. That Court may support the Constitution, as its oath requires, or it may fail to do so, but it cannot change it. Under Article 6, only the Constitution and the laws made pursuant to it are binding on this court.”

⁵⁴ Taking the Constitution Away from the Courts; Princeton University Press, 1999. “Ibid” refers to that book.

⁵⁵ Ibid. Chapter 7, “Assessing Judicial Review”, has a topic addressing Constitutional Social Welfare Rights. P.169

“*Taking the Constitution Away from the Courts* is a major work - a potential classic that promises to be an academic bestseller. The author is one of the most prominent and controversial figures in the legal academy, and he has presented a genuinely new position: a bold thesis rejecting judicial review and traditional constitutionalism entirely. Tushnet demonstrates that the case for judicial review and thick constitutionalism is far, far more complex than previous theorists have recognized. Any person who wants to defend those principles in the future will have to deal with the claims of this book. Mark Garber, *University of Maryland*.”

That introduction on the back cover of Tushnet’s book is a good place to begin to distinguish our theories. His object is to prevent overturning acts of Congress by *judicial review*. While they overlap, judicial review and judicial supremacy are not the same. His first chapter is entitled “Against Judicial Supremacy” and Chapter Seven is “Against Judicial Review”. But while he treats the concepts by separate names, he does not seem to distinguish between them.

I call that distinction “Splitting the Judicial Supremacy Concept”,⁵⁶ and it is very important for both his theories and mine. The judicial oath *requires* judges not give effect to acts violating the Constitution. Therefore, some functions of judicial review are mandatory. That poses a problem for Tushnet. For he cannot advocate that Supreme Court Justices disregard their oath so that Legislative Supremacy can prevail.⁵⁷

But beyond the mandatory function of judicial review are two separate functions of judicial supremacy that can be split off. The first is “supremacy over the Constitution”.⁵⁸ As we have seen, it’s not just unconstitutional, it is outright “anti constitutional”.⁵⁹

⁵⁶ See the sub topic by that name in Part IIA. I distinguish between the two concepts throughout this article.

⁵⁷ I think that Tushnet’s failure to “Split the Judicial Supremacy Concept” accounts for a lot of the complexity and convolutions of his theory and is probably why they can’t “come together” to support the written Constitution.

⁵⁸ The unlawfulness of this form of supremacy is because it does what all of government cannot lawfully do, impair the rights or freedoms of the People beyond what the Constitution allows.

⁵⁹ The moving force behind unlawful judicial supremacy is the absence of organized resistance to it. Congress is the most likely potential force to limit it, but the problem is the absence of a moral impetus to organize to that end. Tushnet’s work provides a moral organizational impetus for Congress to act. The jury can also stop judicial supremacy, but it is ineffective against judicial organized force. Tushnet’s work is important to tell Congress that it must organize to stop the judicial usurpation of power. My theories help point what Congress, and individuals as jurors, can do to restore balance to the system. See the Conclusion, herein.

The second function is “supremacy over the rest of government” to set standards that do not directly affect the people or their rights.⁶⁰ That supremacy is often distributed by consent and it can be supremacy by any branch over a limited scope of rule making. But this function becomes judicial business when rules designed to regulate internal government conduct end up regulating people’s rights and access to government. Then judicial supremacy and immunity become major factors as internal rules become systematic violations of the People’s rights. In effect, by having nullified the Right of Petition, judicial supremacy becomes a reliable underlying support for illegal supremacy by other branches.

When the judiciary asserts supremacy over Congress as in *City of Boerne v Flores*,⁶¹ it directly involves the People’s rights under what Tushnet calls the “thin Constitution”.⁶² That is his battleground. The major thrust of his argument is that Congress can interpret the thin Constitution at least as well as the Supreme Court, and probably better; and with much more legitimate right to speak for the People on the matters that affect them.

One difficulty with Tushnet’s theory is that he doesn’t tell us how to move from the existing state of Judicial Supremacy to Legislative Supremacy as he sees it. We note that Congress has an equalizing power over the Court that Tushnet does not examine, so we will.

⁶⁰ For example, the exclusionary rule is lawful in so far as its imposition is pursuant to the Courts supervisory powers over the federal courts. But when it declares the rule a part of the Constitution itself, that is unlawful. In either event, it is a good example of how rules that are not directly designed to affect rights, do so indirectly. This rule originally designed to supervise police conduct now pervades our entire criminal justice system.

⁶¹ 521 U.S. 507, 117 S.Ct. 2157 (1997). Tushnet considers this case and its principles at length.

⁶² The Boerne issue arose as follows: In *Sherbert v Verner*, 374 U.S. 398, (1963), the Supreme Court developed and applied the “Compelling State Interest” doctrine to determine when general laws may burden religious freedom. That remained the rule until *Employment Division v Smith*, 494 U.S. 872, (1990). In *Smith* the Court curtailed the rule to protect freedom of religion only from laws that target religion. Congress enacted the Religious Freedom Restoration Act of 1993, (RFRA) to restore the “Compelling State Interest Doctrine” and expressly overruled *Employment Division v Smith*. The issue in *City of Boerne v Flores* was whether Congress could overrule the Court. It is a double supremacy issue. First there is the largely ignored underlying issue of the supremacy of either branch over the Constitution so as to dictate any rule of interpretation *abridging* the First Amendment. And then there was the struggle over which of equal branches was supreme to the other. The Supreme Court won on both counts. Congress lost, and the rights of the People were ignored. So, We, the People, lost on both counts too.

If a majority of Congress believes the Religious Freedom Restoration Act (RFRA) overturned in *Boerne* is Constitutional, then by implication the Justices violated their oath by invading Article I, prerogatives. That is not “good Behaviour”⁶³ and Congress can impeach.

There is a precedent for such jealous protection of its turf. When President Franklin Roosevelt thought the Court overstepped its constitutional bounds with “economic substantive due process”, he defended Congress’ turf with a “Court Packing Plan”. Congress can respond to usurpation of its prerogatives with a “Court Emptying Plan” under its impeachment power.

A problem with such a showdown over *Boerne* is the unseemliness for Congress to fight over a supremacy that it does not have (either).⁶⁴ But *Boerne* is based in non-constitutional rules of interpretation that aren’t even principled. In an impeachment showdown the justices would have to show that their oath, as opposed to a desire to establish an institution supreme to both the Constitution and Congress, required that result. Congressional debate over the *Judicial Supremacy vs. Judicial Review* dichotomy would send the judiciary to a safer place from which to exercise lawful judicial review more prudently.

Thus, legislative supremacy is possible for the kind of issues in *Boerne*, broad rules of interpretation like the “compelling state interest” doctrine. But there were two unique circumstances affecting *Boerne* that are not generally applicable.

The first is that Congress did not create the rule of interpretation. It merely selected which of two rules previously created by the Court to apply in religious freedom cases. That takes a lot less organization than trying to create rules of interpretation initially. So, while it is

⁶³ U.S. Constitution Article III, Section 1, limits the office of judges to “during good Behaviour”. Notice how this clause turns the tables on the Judiciary. For impeachment, Congress interprets the Constitutionality of Judicial Acts.

⁶⁴ Of all issues, the *Boerne* issue begins with “Congress shall make no law abridging ...”. How is Congress to assert authority to create a rule of lesser abridgement against the Court’s assertion of a rule of greater abridgment? That is the unaddressed issue underlying the *Boerne* case. The solution is to give the issue and the First Amendment as it is written, to the Jury in every case involving government where a party asserts a First Amendment violation.

doubtful that Congress can originate such rules, Tushnet is probably right that Congress can direct the Court along alternative courses, when it has the incentive.

That raises another circumstance not generally operative. It takes a lot of incentive for Congress to organize that kind of rule making. The organized religious right supplied incentive for RFRA. Yet, with all of that organizational power, when the Court overturned RFRA there was no hint that Congress was ready for a showdown over RFRA, or over supremacy.

Thus, while legislative supremacy is possible, it may not be practical because of the need for such a showdown and even then it would have to be limited. The more closely the Court draws its rules to the Constitution as it is written, the more united the Court will be to declare that its oath compels it to refuse to give some acts of Congress judicial effect. In order to understand these limits, we have to “Split the Judicial Supremacy Concept” into lawful judicial review as the judicial oath requires, and unlawful judicial supremacy over the Constitution.⁶⁵

We will see that the same general concept, once split, applies to each of the Branches.

Splitting the Judicial Supremacy Concept: In describing features of “The Incentive-Compatible Constitution”⁶⁶ Tushnet set up an example that actually illustrates two points helpful to splitting the judicial supremacy concept. First, that interpretation of the law is not law; and second, that each branch has its own “Right of Review” with respect to its own duties.

His example is of the Communications Decency Act regulating sexually explicit material on the Internet. He notes that one of its provisions bans information regarding abortion. President Clinton, a pro-choice liberal, could have vetoed the bill, but signed it saying that he would not enforce that provision. Tushnet asks why the refusal to enforce that provision does

⁶⁵ When “lawful judicial review” is seen as an act compelled by the Court’s oath, then it can be readily recognized that all branches have this kind of “supremacy” with respect to their particular duties.

⁶⁶ The title of Chapter Five in “*Taking the Constitution Away From the Judiciary.*” The example is at page 119.

not violate Clinton's duty to "take care that the laws be faithfully executed." His answer is that political pressures do not rise that high because that provision is not central to the act.

His mistake is due to an assumption that interpretations of laws are law. They are not.

We can interpret the same facts differently: The President knows the abortion information ban violates protected speech.⁶⁷ It is not "Law" because enforcement would violate law. Thus, the President is *obligated not to enforce it*.⁶⁸ His refusal is not based on confidence in what he can get away with, but it rests on a reasonable interpretation of his constitutional duty, in context.

Our difference of understanding points out the true nature of constitutional interpretation.

Observe that law, to be applied, must be interpreted. Tushnet tries to postulate the law of the case. But he can't and we can't. We can only render "reasonable interpretations and applications" of the "relevant law" to the "facts" we find. And, the "relevant law" determines what facts to look for; and *visa versa*. In the example, Clinton knew that Congress couldn't make "laws" that require him to violate his oath any more than it can require Justices to violate their oath.⁶⁹ His security for non-enforcement is the persuasive force of his *argument* that enforcement violates the First Amendment.⁷⁰ That same rule of "reasonable interpretation and application" to the facts of the case, applies to all law, including to the "laws of science".⁷¹

⁶⁷ While the abortion rights is a liberal issue, the right to information about abortion is a clear First Amendment issue that conservative President George Bush II will see the same as liberal President Clinton.

⁶⁸ A "law" that the President is obligated not to enforce is a contradiction in terms and therefore can't be Law.

⁶⁹ This is the same legal fact that precludes doing away with judicial review. Congress can't even appear to make law that requires judges to violate their oaths. That's why he must split the "judicial supremacy" concept.

⁷⁰ Notice that this is a genuine case of "presidential review" to the same end that judicial review would obtain.

⁷¹ As applied to scientific theory, this is a law of logic; the "Law" of non-contradiction.

Interpretation of the law, no matter how reasonable, is not law.⁷² That implies that there is nothing compelling in any interpretation unless “The Law” makes it so. Since we have just witnessed a case of mistaken congressional supremacy and “presidential review”, we must conclude that while supremacy of any branch is possible, absent a constitutional clause favoring one, no branch has legal supremacy other than to perform its own duties under its oath.

Notice that finding the relevant law and facts is a reflexive endeavor that intertwines to make interpreting the law an intricate part of finding the relevant facts to apply it to. Given these properties for interpreting law, it is clear that judicial interpretation of law is not law, but interpretation and application by the jury is the only law that counts: The law of the case. The only clauses that make interpretation of law compelling are those requiring jury trial. That is where interpretation of law and fact combine to take on a compelling legal significance.⁷³

The real supremacy problem is that only government gets to interpret “the law”. First, the police interpret it; then the prosecutor interprets it; and then the judge interprets it for the jury because they can’t interpret it for themselves. If government consistently interprets the law for government’s convenience in governing, as government is prone to do, almost any expression of rights that is inconvenient to government can end with a conviction of crime, no matter how reasonable your non-criminal or “protected” interpretation and application is.⁷⁴

⁷² Article I specifies that only Congress can make law. But to be clear, there are zones of reason by implication or inference around every law that range from strict implication to long chain arguments. The more remote the zone of reason from the black letter law, the less enforceable that law. Such “zone of reason” exist around all laws and they come into conflict with like zones of reason around potentially conflicting laws. So for example the zones of reason surrounding laws against assault and battery come into conflict with laws zones surrounding the right of self defense or defense of property or others. In a constitutional sense, most laws at some point overlap the “zones of reason” that surround constitutional rights. Which zone prevails depends on reasonable argument from the black letter law to the facts of the case. That is obviously a question to go to the jury. But in that zone is also where the Supreme Court makes “rules of interpretation” like those in *Boerne*. Thus, my point that the real fight over supremacy is not between the Court and Congress, but between the government and We, the People, sitting as jurors and grand jurors. But Congress does play an important part in that fight. It ought to side with the People, for jury and grand jury rights, against Judicial Supremacy, to re-establish a balance of power among the Branches of Government.

⁷³ Article III, Sec. 2, Cl. 2, and the Sixth and Seventh Amendment each require trial by jury.

⁷⁴ There is a case pending in the United States District Court for the Eastern District of California before Judge Shubb as this is being written that raises this exact issue. *United States v Richard Finley*, 2:98 CR 00460-01WBS. Finley is convicted of attempted bank fraud and attempt to interfere with administration of IRS laws. He seeks a

Conclusion to Splitting the Judicial Supremacy Concept: Government's interpretation of law is neither law, nor the next best thing to law. There are two interpretive sides to every law, a government side and a people side; and *judges are always on government's side*. It is the two sides reasoning about the interpretation and application of the law in each case that is a living *Constitutional Common Law* shifting so slightly to accommodate the morality of evolving civilization. Problem: Under judicial supremacy only government has bargaining power.

A form of judicial supremacy **over government** is necessary for judicial review. But that "supremacy" devolves from the logical order in which the judiciary is the final branch to determine the constitutionality of acts that the rest of government has already certified.

But how do we split that logical part of the concept off from that which has the judiciary becoming the final arbitrator of constitutional meaning, period? To phrase the problem another

new trial or JNOV on the grounds that his acts were protected by the Petition Clause; his appointed Counsel refused to raise the issue and the Court failed to take notice of the First Amendment implications. **The Facts:** Finley owns and operates America's Legal Bookstore in Sacramento, for over 15 years. He caters to all areas of law. He sells law books and teaches bar review courses, and he also sells "patriot", legal self-help and philosophy books and so on. He provides a meeting place for both fringe and orthodox law related groups. For years he has wanted to expand his all-purpose legal bookstores into a chain across the country. In 1995 he attended a two-day seminar by Leroy (Montana Freeman) Schweitzer where Leroy taught how he obtained large liens against federal officers and banks, and how they could be negotiated. After the seminar Schweitzer provided three instruments to Finley in exchange for one third interest in Finley's profits from the chain of bookstores totaling over \$6,000,000. One was to pay back taxes, another to pay off his home loan and the third to finance the chain of bookstores. Each instrument was made payable jointly to Finley and the IRS or the Banks with whom Finley did business, and were drawn against an identified lien for \$77,000,000 filed and recorded against NorWest Bank. Before attempting to negotiate them Finley determined that a recorded lien was in place. Upon submitting the instrument for collection to his regular bank, he was told that there was a "fraud alert" on them and they were not valid. He inquired into the nature of the "fraud" and could not be told. He asked his congressman to find out, and Congressman Matsui tried but could not find out why the instruments were called fraudulent. He then resubmitted the instrument to the same regular bank officer and asked that the warrant be forwarded to NorWest for collection, to see what NorWest would do. If they refused to pay it, then they would have to say why, and he could decide whether or not to sue NorWest for dishonor. (He did likewise with each of the other instruments to the IRS and another bank). The reason this becomes a federal Petition Clause issue is the same that the feds say it is a federal crime. The feds control the banks and seeking redress of the grievance of dishonor from them is the same as seeking it from federal agency. Now notice, the **act** of seeking redress is the same **act** as "attempting" to defraud. But by alleging "attempt" and not letting him perfect his claim against NorWest, he is not allowed to prove his innocence of fraudulent intent, nor is he allowed to learn the legal reasons why the instrument is "fraudulent", if it really is fraudulent. Notice how the Right to Petition explains the privileged nature of the same act of submitting the instrument to the bank for collection. **One other Fact** is significant: He was indicted just before he was to testify for Schweitzer, and it was first announced in court to prevent his testimony. The present difficulty is to even get Finley's appointed attorney to treat the Petition Clause issue seriously. How could the lien for \$77,000,000 be legitimate? Simply: It involves defaults in a lawsuit and under the Uniform Commercial Code

way, notwithstanding a judicial interpretation one way, the people must be free to interpret it another with a force sufficient to nullify the judicial interpretation when applied to the People.

How is that possible within the framework of the existing Constitution?

Article III contains its own limitation on judicial power. “The Trial of all Crimes, ... shall be by Jury.”⁷⁵ That is a very significant limitation. In a criminal case, a jury can nullify all that the combined forces of government do to convict the accused; and such an acquittal is not reviewable. Juries are the People’s offset against unrestrained government power.⁷⁶

Judicial Supremacy vs. Jury Nullification: The judiciary is an adversarial system. It should not surprise anyone that finding and applying the real law of the land within that system, is inherently an adversarial process. But the scope of that process is not generally understood. As a result, we tend to think that the adversity is just between the parties. It is much broader.

Think for a moment, that most criminal cases are between government and a member of the governed. No big thing, until you remember that the Judge is a part of government, and is not unbiased. His job, and the job of the courts of appeals and the Supreme Court, is first, last, and always, to govern ... according to the rules of the Supreme Branch of Government.

The dividing line between government and governed is the Constitution. If you let the Government be the sole interpreter in the judicial process, surprise of surprises that it should interpret law with a progressive bias for its governing process, to control the people ... us.

So let’s see if we can’t find and examine the scope of adversity between the judge, as representative of the judicial branch, and the jury, as representative of “We, the People”.

Judicial Supremacy decides the constitutionality of laws based on doctrine it develops like “clear and present danger”; “chilling effect”; “compelling state interests”, vagueness and

⁷⁵ U.S. Constitution, Article III, Section 2, Clause 3. See also the Sixth and Seventh Amendments.

⁷⁶ *United States v Gaudin*, 515 US 506, (1995) recognized the jury’s right to decide issues of mixed law and fact.

over breadth tests for First Amendment and criminal cases. Surely, we don't expect a jury to interpret and apply the Constitution with tests like that. But the tests are not law and the justices can't agree on when they apply anyway, so we might have higher hopes for the jury.

If a law touches First Amendment rights, a jury would not determine that it is "void for over breadth". That is a judicial review function. But the jury is interested in whether the law government seeks to apply does "abridge" First Amendment rights in the case. If it does, the accused is innocent because the First Amendment says that "Congress shall make no law abridging..." and therefore it cannot be applied that way.

Likewise, a jury won't declare a law void for vagueness. But if the 12 jurors can't agree that a vague law fairly covers the facts, they acquit or hang. Likewise if they can't agree that it gives fair warning of what it prohibits, or if they find that what it prohibits is not within a reasonable interpretation of what the Constitution allows government to control. Juries can do these things; and they can do them as well or better than judges without corrupting justice.

Yet, that does not interfere with the judicial function. Judges still set the standards for judicial enforceability of government acts. The difference is that first, a jury decides. If the jury interprets the law and facts to convict, then the judges get their chance to determine if the jury's interpretation meets minimum judicial requirements, just as they do now

Jury nullification doesn't nullify "bad law". It only nullifies immoral interpretations and applications of it, one case at a time. By doing that, juries collectively tell the executive what interpretations it has trouble applying so the executive can apply laws in better ways. Likewise, it tells the Congress what kind of laws it will not enforce so that Congress can make laws more amiable to the "Constitutional Conscience" that juries collectively reflect. And it sends its

collective message up the channels of judicial review so that justices can better understand what the “reasonable person” finds unreasonable, about the law.

Indeed, Judicial Review and Jury Nullification compete to influence the “Constitutional Conscience” of the Nation.⁷⁷ But just as adversity within the judicial system is necessary to find truth, these two concepts work hand in glove to better interpret the law that is, to evolve better understanding of the law that ought to be. Between them, they iron the bumps and cover the pitfalls of our collective quest to develop more moral and civilized forms of government.

PART IIB: Democratizing Judicial Accountability. Judicial unaccountability is an interactive composite of three problems: Sovereign and judicial immunity, and the complicated interdependent relationship between the executive and judicial departments play major roles.

Sovereign Immunity-Judicial Immunity Issue: The Supreme Court created sovereign immunity from whole cloth almost from the birth of the Nation. This is the official version:

“Immunity of the United States from Suit: Pursuant to the general rule that a sovereign cannot be sued in its own courts, it follows that the judicial power does not extend to suits against the United States unless Congress by general or special enactment consents to suits against the Government. This rule first emanated in embryo form in the obiter dictum by Chief Justice Jay in *Chisholm v Georgia*,⁷⁸ where he indicated that a suit would not lie against the United States because ‘there is no power which the courts can call to their aid’. In *Cohens v Virginia*,⁷⁹ also by way of dictum, Chief Justice Marshall asserted, ‘the universally received opinion is that no suit can commenced or prosecuted against the United States’. The issue was more directly in question in *United States v Clarke*,⁸⁰ where Chief Justice Marshall stated that ‘as the United States is not suable as of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it.’ He there upon ruled that the act of May 26, 1830 for the final settlement of land claims in Florida condoned the suit. The doctrine of exemption of the United States from

⁷⁷ We “inherited” our common law precepts from England. But England does not have a written Constitution. Indeed, its common law as governing principles, are limitations on the Crown and rights won from rebelling against the Crown, is its Constitution. We, with a written Constitution, have yet to develop a “Common Law” that is a governing “Conscience” to our Constitution as the English Common Law is to its governing principles.

⁷⁸ 2 Dall (2 U.S.) 419, 478 (1793)

⁷⁹ 6 Wheat (19 U.S.) 264, 412 (1821)

⁸⁰ 8 Pet. (33 U.S.) 436, 444 (1834)

suit was repeated in various subsequent cases, without discussion or examination.⁸¹ Indeed, it was not until the *United States v Lee*,⁸² that the court examined the rule and the reasons for it, and limited its application accordingly.” *Constitution of United States of America, Analysis & Interpretation*, (1992) p.746

But if that is an outrageously pathetic basis upon which to assume that most awesome power, the Court out did itself when it immunized judges in *Bradley v Fisher*.⁸³ That case arose out of the Lincoln assassination trials. Bradley, a lawyer, defended John Suratt to hang the jury. Fisher was the trial judge. During a recess Bradley confronted Judge Fisher and accused him of insulting and demeaning Bradley in trial. After trial, Fisher disbarred Bradley from his court because of his rudeness. Bradley sued Judge Fisher, and that began the second most awesome usurpation of Constitutional Rights in this Nation’s history. From that day on, judges have all of the immunity “necessary” to protect all other government agents who wrongfully injure people under color of “law”, from accountability under the law.⁸⁴

The Judicial Accountability Problem arises out of a combination of sovereign and judicial immunities. While judicial immunity does not, by itself, violate the Petition Clause, as “judicial

⁸¹ The Court repeated the doctrine of sovereign immunity in at least a dozen cases in the nineteenth and early twentieth century, but it has never analyzed its constitutionality. Some of those cases are: *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 431 (1867); *United States v. Eckford*, 73 U.S. (6 Wall.) 484, 488 (1868); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *The Davis*, 77 U.S. (10 Wall.) 15, 20 (1870); *Carr v. United States*, 98 U.S. 433, 437-39 (1879); *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 275 (1869); *United States v. Lee*, 106 U.S. 196 (1882); *Peabody v United States*, 231 U.S. 530, 539 (1913); *Koekuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922). In *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), Justice Holmes stated the reason for sovereign immunity is because "there can be no legal right as against the authority that makes the law on which the right depends." His explanation begs both the tenth amendment and petition clause questions, and portrays government power as not bound by any law, not even its own. Again, government is portrayed as a “Brut of Force” that trounces its own people without accountability for the wrongs it does. Such is a shocking statement by a man of his intellect, for it is obvious that the ultimate recourse against the authority that makes law but disregards rights is revolution ... and to institute a new government that is not so impertinent to the basis of power. That is what our forebears did in 1776. Notwithstanding government’s objection to such an interpretation, that right of rebellion is embodied in the common law behind the petition clause.

⁸² 106 US 196 (1882) Compare this statement to what the Court actually said in *U.S. v Lee*, in footnote 18, supra.

⁸³ *Bradley v Fisher*, 80 U.S. (13 Wall) 335 (1872) is the seminal case underlying all judicial immunity.

⁸⁴ In fact, Judicial Immunity was not the law of England when Bradley was decided. See *Kendillon v Maltby*, 174 Eng. Rep. 362, 566 (N.P. 1842) Opinion of Chief Justice Lord Denman. That was a suit for slander against a judge. The standard announced by the Chief Justice was for judges in 1842 England, the same as our “public figure” doctrine today, with the difference that it applied to judges too. Nor is judicial immunity to violate the Constitution the law of Commonwealth Countries today. See *The Digest of Annotated British, Commonwealth and European Cases*, note 3641. Commonwealth Countries award damages for violation of the Constitution by judges.

legislation” it violates Article I, and in combination with sovereign immunity, it totally deprives victims of any rights to redress wrongs by judges, no matter how malicious or atrocious, and that does violate the Petition Clause.⁸⁵ While judges are not immune from criminal law, their symbiotic relationship to most of government, particularly to law enforcement and prosecutors, gives them defacto criminal immunity in any case that plausibly can be ignored or covered up.

In California, the judicial immunity problem is so bad that citizens are organizing under an initiative to set up statewide special grand juries to limit judicial immunity and investigate judicial misconduct for crimes and bring them to trial.⁸⁶ In 1998 the legislature became involved and wrote the first criminal law specifically aimed at judicial corruption.⁸⁷

But these are “cries in the wilderness” that barely begin to address the problem.

Immunity is a class problem splitting the Nation and the world into two classes distinguished by availability or non-availability of *effective* protections of law. Initially, the classes are divided by the special rules of law and could be called “government” vs. “governed”. But that quickly breaks down to include with government those who can buy “justice” from a government that is not accountable for how it dispenses injustice, resulting in a two-class society distinguished by the corruption of law for the one, and the oppression of law against the other.

On its face, such a society looks like a “just” society because the written law seems to be fair. But actual fairness is undermined by organized corruption in government at all levels, and that causes and allows capricious and arbitrary uses and abuses of “law”. Such abuse of power

⁸⁵ The Petition Clause prohibits abridging the People’s right to sue government. Plausibly, judicial immunity could be lawful under the doctrine of *respondeat superior*, where government stands, literally, in the judges shoes.

⁸⁶ The Judicial Accountability Initiative Law (JAIL) is a ballot initiative that would restrict judicial immunity to frivolous cases and establish a statewide special grand jury system to evaluate judicial conduct for potential liability, and for criminal conduct from the bench. The initiative and related matters can be viewed at www.jail4judges.com

⁸⁷ California Penal Code Section 96.5 “Obstruction of Justice. Every judicial officer, court commissioner or referee who commits any act that he or she knows or should have known perverts or obstructs justice of the due administration of the laws, is guilty of a public offense punishable by imprisonment in the county jail for not more than one year.” Part (b) of that section specifically authorizes its use in conjunction with conspiracy, a felony.

inevitably favors the rich and holds the poor hostage to “fair” laws that work only in one direction; to increase the wealth and power of the rich, and the bondage of the rest of us.

That defines and establishes an elite ruling class of a “New Nobility”. That is our future, unless we restore the balancing forces of accountability of government to the people for the wrongs that it does. The primary force of accountability is the right to sue government under one law, enshrined in the Right to Petition. What more need be said of the sacredness of that right, than that “Congress shall make no law abridging it”. Privileges and immunities for government and its officers that neither Congress nor the Courts can lawfully make, nullify that right.

The Petition Clause--Seventh Amendment Solution: Under the Petition Clause there is only one solution. There can be no special privileges or immunities for government.

The Petition Clause prohibits laws that abridge rights to petition government for redress. That includes laws specially protective of government like “tort claims acts”⁸⁸ and laws treating constitutional torts differently than civil torts; laws abridging *respondeat superior* to protect the government superior, exhaustion of administrative remedies and immunity. A very interesting thing happens when such protective laws “abridging the Right to Petition” are annulled. ***What is left is one class of laws “common to both the people and to their government”.***

⁸⁸ Tort Claims acts must be redesigned. The Petition Clause forbids *requiring* people to use administrative remedies. But government can induce people to use administrative remedies by making them more effective, fair, speedy, predictable and less complicated than judicial process. Such remedies can compete for the People’s choice.

That is “The Common Law” referred to in the Seventh Amendment.⁸⁹ Such a single class of laws *common to both government and governed* is the very essence of being ruled by “One Law”. That was the evolving tradition of English Common Law when we separated from it.⁹⁰

That hand and glove relationship between the Petition Clause and Seventh Amendment is the basis of trust and partnership between government and governed. Observe how so much of the concept of moral justice so necessary to civilized society depends on the commonality of

⁸⁹ The judicial interpretation of the Seventh Amendment “Common Law” clauses only determines the right to a trial by jury. That interpretation is that in cases like those in pre 1791 English Common Law where a right to jury existed, it is preserved under the Seventh Amendment. Generally, the modern distinction depends on the relief sought, whether legal (money damages) or equitable (injunctive or declaratory). But there is a broader meaning to the term than the Supreme Court attributes. That meaning is “the law that is common to us all” including to government. Given its proper significance, the Petition Clause precludes any other type of “common law”, whether from England, the States or Congress. There is good reason to believe that is what Seventh Amendment “Common Law” means. The English Common Law, as it was developing in pre 1791 England eschewed special laws protective of government and had several revolutions to throw off such special laws. See, for example, *Introduction to the Study of The Law of the Constitution*, 8th Ed. by A.V. Dicey, originally published in London by Macmillan, (1915) now by Liberty Fund in the United States. Of particular interest is Chapter XII, the “Rule of Law Compared with *Droit Administratif*.” There, Dicey compares early development in English Common Law to later development of *Droit Administratif* (Administrative Law) in France under Napoleon. The distinguishing feature of *Droit Administratif* from Common Law is that it is administered by special (administrative) courts under special laws. In both cases, the “courts” and “laws” are more favorable to the government (king) than at Common Law, and their purpose is to address (not “redress”) the people’s grievances with government on terms more favorable to the government than under common law administered by common courts. At page 216-217 Dicey defines *Droit Administratif* as “that portion of French law which determines, (i) the position and liabilities of all State officials, (ii) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii) the procedure by which these rights and liabilities are enforced.” Unlike the French, the English waged rebellions against the Crown rather than accept such special laws administered by the King’s Chancellors. In the Sixteenth and early Seventeenth Centuries special laws briefly prevailed and were known as the “King’s Prerogative”. The “Prerogative” was advocated by Chancellor Francis Bacon (1561-1626) and opposed by Coke and Eliot. It is the power behind Star Chamber authority. Basically, it held that the Prerogative was above ordinary law and where the Crown had important interests, the administration has powers that cannot be controlled by courts. That part of the “common law” may be what judges declare to justify sovereign immunity. But the fact is that rule by Prerogative was a small part of English Law that ended long before our Revolution. Dicey says of the attempt and failure to institutionalize the Prerogative, p. 245: “... The endeavor had a partial success, because circumstances, similar to those that made French monarchs ultimately despotic, tended in England during the sixteenth and part of the seventeenth century to augment the authority of the Crown. The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions”.

⁹⁰ The idea that we should be stuck with English Common Law, as it existed immediately prior to our Constitution, is ridiculous. English law was evolving from the barbarian rule of tyrants, to establish an unwritten constitutional law, and to higher forms of civilized constitutional democracy. Factually, the idea that “sovereign immunity” was a part of English Common Law in 1791 is false. Sovereign immunity was lost in England in 1215 with the Magna Carta. English monarchs had less power after that and by the end of the seventeenth century, the Right to sue the government and the idea of equality under the law with government (The Rule by One Law) were firmly established, albeit, still evolving conceptually and as a tradition. See Footnote 20, *supra*. Thankfully, our ideas of law, like our ideas of science, are still evolving, and this article, hopefully, contributes to that evolution.

“One Law” that can only exist when the common people, sitting as juries, have and use the power to nullify government’s biased interpretation and application of the law.

Judicial supremacists like Judge Bork will say that jury nullification is an absurd idea. But observe for yourself: A biased judiciary interpreting the Constitution where “Congress shall make no law abridging” created Sovereign, Judicial and a host of immunities by which it stole the Constitution. To cover up the theft, judicial supremacy gave us such compound, complex and convoluted law that even lawyers and judges can’t unravel it. Then, embarrassed by its own wrongs, it refuses to address obvious issues like how can government immunity to violate rights and constitutional protection of rights, both be the law? Those are the really “absurd ideas”.

Conclusion: Our Constitution is founded on Moral Law. Its guiding themes to “establish Justice, insure domestic Tranquility, promote the general Welfare, and secure the blessings of Liberty” are moral themes balanced by principles to ‘form a more perfect Union and provide for the common defense’.⁹¹ Those themes are important to its just interpretation, as it is written.

We have no cause to begrudge what government has done to perfect the Union or to provide for its Defense. But its mandate to establish Justice requires moral guidance.

In examining Judge Bork’s “Original Understanding” we found that judicial supremacy abhors moral law and perverts the interpretation of a Constitution designed for moral Justice.

We found that Professor Tushnet’s “legislative supremacy” is possible and the morality of “The Project of the Declaration and Preamble” can guide Constitutional interpretation for both the legislature and for juries. But his model rejecting judicial review requires that Justices violate their oath. So we “Split the Judicial Supremacy Concept” and learned that while judicial review is a necessary result of equality among the Branches, supremacy over the law can be split off and, with threat of impeachment, Congress could confine the Court to strict interpretation.

⁹¹ These are the six guiding principles enshrined in the Preamble. Four of six are moral principles for the People.

While Tushnet's theory is possible, it is unwieldy and unlikely to move Congress to such extremes, and it avoids the issue: Who shall interpret the law as it applies to cases, and how?

Our Constitution allows no immunity. The resulting equality between government and governed is the law for a "Kinder, more Gentle America". As Judge Liddle said, 'The Constitution, as it is written, is the supreme law that is binding in this Court'. (See fn. 53)

The solution to judicial supremacy is to balance government's systematic bias in interpreting and applying law, with a Constitutional Conscience. To re-establish that conscience, we must "Unabridge" the Right of Petition, and Free the Jury and Grand Jury to do their work.

The Miracle of America is neither "republicanism" nor "democracy" in any strict sense. The "Project of the Declaration" now sweeping the world is a Constitutional form of Democracy. The Right of Petition for redress to juries and grand juries free to judge government and governed under the supreme law common to both, is the *Thing* that democratizes the judiciary by subjugating judicial supremacy to the Constitutional Conscience of the People.

John E. Wolfgram, January, 2001